

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
ATTORNEYS AT LAW

STEVEN H. CHESTNUT
JAMES L. VARNELL
RICHARD M. BERLEY
MARC D. SLONIM
JOHN B. ARUM
BRIAN W. CHESTNUT

OF COUNSEL:
ALVIN J. ZIONTZ

RECEIVED
MAY 23 PM 1:00

ATTORNEYS AT LAW
OF WASHINGTON
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230
FACSIMILE 206-448-0962

May 22, 2006

CCTN # 73184
Date Assigned 5/23/06
Assignee: SGO
cc: Rob Costello

The Honorable Rob McKenna, Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504-0100

Re: Request for action regarding constitutionality of SESSHB 1338 (2003)

Dear Attorney General McKenna:

In accordance with procedures for taxpayer actions set out by the Washington Supreme Court,¹ Hoh Tribe, Jamestown S'Klallam Tribe, Lummi Nation, Makah Indian Nation, Squaxin Island Tribe, Suquamish Tribe, Swinomish Tribe, Tulalip Tribes, Quinault Indian Nation, and Yakama Indian Nation (the "Tribes") on their own behalf and as taxpayers on behalf of all taxpayers of the State of Washington hereby request that you file an action to invalidate certain provisions of SESSHB 1338 (2003) that retroactively expand certain favored classes of water rights to the detriment of all other water rights. The Tribes contend that these provisions and their retroactive application violate the Due Process Clauses of the Washington and United States Constitutions and separation of powers doctrine. Below we set out the interests of the Tribes in this matter, the specific provisions of SESSHB 1338 that the Tribes contend to be unconstitutional, and the legal basis for these claims.

Interest of Petitioners

Each of the Tribes hold a treaty right of taking fish at all usual and accustomed grounds and stations in common with other Washington citizens. *See, e.g.,* Treaty of Medicine Creek, Art. III, 10 Stat.1132 (Dec. 26, 1854). By virtue of their treaty fishing rights, the Tribes have legally protected interests in instream flows. State law also establishes rights in instream flow

¹ *See, e.g., State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985).

under State law to support common fisheries. See RCW 90.03.247; 90.22.010. Under RCW 90.03.345, instream flows, once established by regulation, have the status of appropriative rights under Washington's prior appropriation system. See *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 81, 11 P.3d 722 (2000). Because instream flow rights under state law were generally established during the 1970s, they are junior in priority to many of the water rights retroactively expanded by SESSHB 1338 and will be impaired by the operation of that statute. In addition, some of the Tribes hold state water right permits and certificates issued by the State of Washington that may be impaired by the retroactive expansion of more senior water rights under SESSHB 1338. Finally, the Tribes are taxpayers of the State of Washington and are concerned about the fiscal impact of SESSHB 1338 with respect to State expenditures for watershed planning, water system planning, water rights administration, and water rights adjudications.

Unconstitutionality of S.S.H.B. 1338

The Tribes ask you to take legal action to enjoin the effectiveness and the retroactive application of the following provisions from SESSHB 1338.

1. Elimination of Beneficial Use Requirement for Certain Water Rights (Sections 1(4) and 6(3)).

In *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90, 957 P.2d 1241 (1998), the Supreme Court held that a water right certificate by the State to a private water purveyor must be based on actual beneficial use and may not be issued on the basis of system capacity. The Court reasoned that its holding was required by the Water Code's statutory scheme for perfecting water rights and was consistent with "fundamental western water law." *Id.* at 590-92. Although the *Theodoratus* Court reserved judgment on whether a water right certificate issued to a municipality would be subject to the same actual beneficial use limitation, it suggested that the statutory analysis in such a case would be the same. *Id.* at 594.

Section 6(3) of SESSHB 1338 purports to reverse the beneficial use requirement recognized in *Theodoratus* and retrospectively validate a particular category of water right certificates that were not perfected through actual beneficial use of water:

This subsection applies to the water right represented by a water right certificate issued prior to the effective date of this section for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(3).

There can be little doubt that this provision was intended to apply retroactively to certificates issued before the effective date of the legislation. Indeed, its *only* application is to water right certificates "issued *prior* to the effective date" of the legislation. Furthermore, Section 6(4) of the bill directs that after the effective date of the legislation, Ecology may only issue certificates on the basis of actual beneficial use. *See* RCW 90.03.330(4).

In addition to retroactively validating water rights certificates issued for "municipal water supply purposes," Section 1(4) of the legislation redefines that phrase to encompass the very same type of non-governmental water purveyors at issue in *Theodoratus*. Section 1(4) defines "municipal water supply purposes" to include:

a beneficial use of water . . . for residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year.

RCW 90.03.015(4). The net effect of these provisions is to redefine private water systems for private residential developments, hotels, trailer parks and mobile home parks, as "municipal water supply" systems and to retroactively validate certificates previously issued for such uses that were based solely on system capacity and not on actual beneficial use.²

These provisions violate the Due Process Clauses of the Washington and United States Constitutions. Wash. Const., Art. I, § 3; U.S. Const., 14th Amend. "A retroactive law violates due process when it deprives an individual of a vested right." *State v. Varga*, 151 Wash.2d 179, 195, 86 P.3d 139 (2005); *State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999). A vested right is a right that has "become a title, legal or equitable, to the present or future enjoyment of property." *Shultz*, 138 Wn.2d at 646; *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). While retroactive legislation may be permissible if it is curative or remedial, even a curative or remedial statute may not apply retroactively if it affects a substantive or vested right. *State v. T.K.*, 139 Wn.2d 320, 333, 987 P.2d 63 (1999); *In re F.D. Processing Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). SESSHB 1338 clearly amends the "substantive" and "vested" aspects of existing water rights.

A water right is a form of property that may not be diminished without due process of law. *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993). Under Washington's prior appropriation system, water that is not appropriated by a senior water right holder is available for appropriation by junior water right holders. *See R.D. Merrill Co. v.*

² The new definition of "municipal water supply purposes" also includes water used for governmental purposes by public utility districts, counties, sewer districts and water districts. Finally, the definition extends to non-residential or governmental uses of water as long as some of the water right is used for residential or governmental purposes.

Pollution Control Hearings Board, 137 Wn.2d 118, 128, 969 P.2d 458 (1999). In this case, Section 6(3) of S.S.H.B. 1338, by retroactively expanding the rights of a favored classes of senior water right certificates necessarily will infringe on the vested rights of junior appropriators to the same, finite water resources. These junior water rights include the instream flow rights protected by RCW 90.03.345. The Tribes have a right to rely upon this statute, as well as their own Treaty rights, to support their fisheries.

In *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179, 189 (1999), the Supreme Court of Arizona struck down similar retroactive legislation on due process grounds. The court reasoned that because water rights are "vested substantive property rights" and there is "not enough water for all," the "legal effect of acts that resulted in acquisition and priority of water rights cannot be changed by subsequent legislation" without violating the due process guarantee of the Arizona Constitution. *Id.* The Court invalidated several provisions of Arizona law that purported to retroactively expand certain favored classes of water rights to the detriment of others. *Id.*, 972 P.2d at 190-92.

Arguing that they are merely a curative or remedial amendment of the Water Code cannot save the constitutionality of these provisions of SESSH.B. 1338. An amendment of a statute "is curative only if it clarifies or technically corrects an ambiguous statute." *F.D. Processing*, 119 Wn.2d at 461; *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988). Curative amendments will be given retroactive effect only if they do not contravene any judicial construction of the statute. *Id.* In this case, however, Section 6(3), RCW 90.03.330(3), directly contravenes the Supreme Court's construction of the Water Code in *Theodoratus*, especially with respect to the kind of privately owned water systems that were directly at issue in that case but that have now been defined by Section 1(4), RCW 90.03.015(4), to constitute "municipal" water rights. Furthermore, as demonstrated above, the amendments to the Water Code made by Section 6(3) detrimentally affect junior water rights, including state instream flow rights.

An amendment is "remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right." *F.D. Processing*, 119 Wn.2d at 462-63; *In re Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990). A statute is not remedial where it attaches "new legal consequences to events completed before its enactment." *State v. Humphrey*, 139 Wn.2d 53, 61, 983 P.2d 1118 (1999). Section 6(3) does not prescribe rules of practice or procedure; it retroactively expands certain vested water rights to the detriment of others. It does so by attaching new legal consequences to events such as the construction of water delivery systems and the issuance of water right certificates based on the capacity of those systems that occurred many years before the effective date of the statutes. See RCW 90.03.330(3). As such, it constitutes unconstitutional retroactive legislation that violates the substantive due process rights of the Tribes and other Washington citizens holding State water rights.

Sections 1(4) and 6(3) of S.S.H.B. 1338, when taken together, not only violate fundamental due process guarantees, they also violate the constitutional separation of powers

doctrine. Under this doctrine, the legislature cannot retroactively overrule a judicial decision that authoritatively construes statutory language. See *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997); *State v. Dunaway*, 109 Wn.2d 107, 216 n.6, 743 P.2d 1237 (1987); *In Re Stewart*, 115 Wn.App. 319, 335 n.55, 75 P.3d 521 (2003). By amending the Water Code to retroactively validate an entire class of water rights certificates that the Supreme Court held to be invalid in *Theodoratus*, the legislature impermissibly intruded into the province of the judiciary. See *San Carlos Apache*, 972 P.2d at 197 (provision requiring courts to make adjudications based on maximum system capacity instead of actual diversions violated separation of powers). Legal action by the Office of the Attorney General is warranted to correct the legislature's unconstitutional usurpation of judicial authority and its unlawful infringement of property rights without due process of law.

2. Retroactive Exemption from Relinquishment (Sections 1(3), 1(4) and 3).

Prior to the enactment of SESSHB 1338, State law provided that a water right holder who fails, without sufficient cause, to use a water right for five consecutive years after July 1, 1967 must relinquish the unused portion of the right to the State. RCW 90.14.160. State law also provided an exemption to relinquishment for water rights "claimed for municipal water supply purposes." RCW 90.14.140(2)(d).

SESSHB 1338 retroactively exempts additional classes of water rights from relinquishment by including them in a new definition of "municipal water supply purposes" that goes well beyond that term's plain meaning. Under Section 1(4), the beneficial use of water by a *private* entity is deemed by operation of law to be for "municipal water supply purposes" if it is "for residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year." RCW 90.02.015(4). In addition, Section 3 of the statute requires the Department of Ecology to amend existing water rights certificates held by a "municipal water supplier" to state that the supplier's water rights are held for "municipal water supply purposes."³ RCW 90.03.560.

These provisions constitute unconstitutional, retroactive legislation to expand certain water rights to the detriment of others. The obvious intent behind these provisions is to excuse prior nonuse of water by private and other non-municipal entities by retroactively defining them as "municipal water suppliers" and by defining certain private, non-municipal uses of water as "municipal water supply purposes." The effect of these provisions is to resurrect water rights that have already been relinquished to the State for nonuse and that would otherwise be available to satisfy the rights of junior appropriators including instream flow rights for fisheries.

In *San Carlos Apache*, 972 P.2d at 190, the Supreme Court of Arizona struck down on

³ Section 1(3) of the legislation defines a "municipal water supplier" as an entity that supplies water for municipal water supply purposes under Section 1(4). RCW 90.03.015(3).

due process grounds similar provisions that had the effect of creating new protections against forfeiture that did not exist under prior law. The Court reasoned:

The consequences of failure to make use of appropriated water . . . must be determined on the basis of the law existing at the time of the event, not on the basis of subsequently enacted legislation that may change the order of priority. . . . Forfeiture and resultant change in priority must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture.

Id. The same is true here. By attempting to excuse prior nonuse of water that would otherwise have constituted relinquishment under the law that existed at the time of the nonuse, SESSHB 1338 constitutes retroactive legislation that violates substantive rights of due process protected by the Washington and United States Constitutions that warrant legal action by the Office of the Attorney General.

3. Changes in the Place of Use (Section 5(2)).

It has long been a fundamental tenet of the Water Code that water rights are “appurtenant to the land or place upon which the same is used” and that the place of use of a water right may be changed with the permission of the Department of Ecology only if “such change can be made without detriment or injury to existing rights.” RCW 90.03.380(1); *see also* RCW 90.44.100(2)(d). That the place of use of a water right may be changed only if there is no injury to other existing right is a basic principle of western water law. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777, 947 P2d 732 (1997). In accordance with this principle, Washington’s Water Code incorporates a range of procedures designed to protect existing rights from impairment by a change in the place of use, including publication of notice, a protest period, an investigation by Ecology of the effects of the proposed change on existing rights, and a right of appeal to the Pollution Control Hearings Board. *See* RCW 43.21B.110(1), 90.03.280; 90.03.380(1); 90.44.100(2).

Section 5(2) of SESSHB 1338 would strip these procedural protections for existing rights by decreeing that the service area boundaries set out in a “municipal water supplier’s” approved water system plan shall be deemed the place of use of the water right, even if the system plan includes areas not within the place of use set forth in the supplier’s existing water rights certificate. Section 5(2) reads:

The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20 RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or ground water right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right if the supplier is in

compliance with the terms of the water system plan or small water system management program . . .

RCW 90.03.386(2). The legislation requires that service area boundaries be consistent with various land use and water resources planning documents but, unlike RCW 90.03.380(1) and 90.44.100(2)(d), it does not require that a change in the place of use authorized by the Department of Health or a "local legislative authority" be consistent with and not impair existing water rights. *Id.* It is worth emphasizing that this provision applies not only to municipal water purveyors, but through application of the definitions in Sections 1(3) and 1(4), to private water purveyors as well. *See* RCW 90.03.015.

Section 5(2) serves to deprive water right holders of vested property interests without due process of law. For water purveyors that already have approved plans with service area boundaries that are larger than the place of use set out in their existing water rights certificates, the legislation retroactively and by operation of law expands the place of use of their water rights to match the service area boundaries in their water system plans. An expansion of the place of use of a water purveyor's certificate can easily have adverse effects on other existing water rights both by increasing the overall use of a water right through expansion of the supplier's customer base and also by affecting the pattern of return flows that others rely upon for their own appropriations. *See, e.g., Farmers Highline Canal v. City of Golden*, 129 Colo. 575, 272 P.2d 629, 631-32 (1954). As discussed previously, the retroactive expansion of a favored class of water rights to the potential detriment of other vested rights violates basic due process guarantees. *See San Carlos Apache*, 972 P.2d at 190.

Even with respect to future amendments to water system plans, the statute violates procedural due process requirements because it allows the Department of Health and local legislative bodies to approve changes in the place of use of a water right without (1) notice to affected water right holders, (2) the opportunity to protest such changes, or (3) any requirement that the decision maker consider and protect existing rights when approving a change. Legislation that strips the holders of vested water rights of these basic procedural protections violates the Due Process Clause of the Washington and United States Constitutions. *Jensen v. Department of Ecology*, 102 Wn.2d 109, 118, 685 P.2d 1068 (1984); *Sheep Mountain Cattle Co. v. Department of Ecology*, 45 Wn. App. 427, 432, 726 P.2d 55 (1986); *see also Department of Ecology v. Acquavella*, 100 Wn.2d 651, 656-57, 674 P.2d 160 (1983). The legislature's disregard for private property rights and basic due process guarantees warrants action by the Office of the Attorney General.

4. Elimination of Population and Service Connection Limitations (Sections 4(4) and 4(5)).

Many existing water right certificates held by public and private water purveyors contain limits on the population to be served and the number of service connections allowed. Sections 4(4) and 4(5) of SESSHB 1338 would remove these service connection and population

Rob McKenna

Page 8

limitations, not only for future applications, but also for existing water certificates held by a "municipal water supplier" that possesses an "approved water system plan . . . or an approval from the department of health to serve a specified number of service connections." RCW 90.03.260(4) and (5). As a result of these provisions, both private and public water purveyors may expand their water use to serve new customers to the potential detriment of all other water right holders in the same basin, including State instream flow rights.


These changes to existing water rights certifications occur by operation of law and do not require approval of a change of use application by the Department of Ecology under RCW 90.03.380(1). As with the place of use provision discussed above, Sections 4(5) and 4(5) eliminate substantive protections for existing vested water rights presently incorporated within the portions of the Water Code relating to water rights changes. See RCW 90.03.380(1); 90.44.100(2). By retroactively expanding a favored class of rights to the detriment of other rights and interests, these provisions violate substantive due process guarantees. *San Carlos Apache*, 972 P.2d at 190.

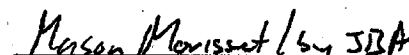
Furthermore, because the statute vests power in the Department of Health to expand water rights through approval of changes to water system plans without providing potentially affected water right holders with a right to be heard and have their interests considered and protected in the decision process, the legislation violates procedural due process requirements. *Sheep Mountain*, 45 Wn. App. at 432. As with the above provisions, the Tribes ask the Office of the Attorney General to investigate and take action to prevent these infringements of the basic property rights of Washington citizens.

Request for Action

The Tribes ask you to investigate the violations of the Washington and United States Constitutions outlined in this petition, to take action to invalidate those provisions of SESSHB 1338 that facially violate the Constitutions, and to enjoin the retroactive application by State agencies and local legislative bodies of all other provisions of SESSHB 1338 in a manner that offends basic due process guarantees. The Tribes ask you to respond to this petition within 60 days. If we do not hear from you within that time, the Tribes will assume that you have denied their petition.

If you have any questions about this petition or wish to discuss this matter further, please contact Terry Williams, 360-651-4471.


John Arum, WSBA # 19813
Counsel for the Makah Indian Tribe


Mason Morisset, WSBA # 273
Kimberly Ordon, WSBA #16832
Counsel for the Tulalip Tribes

Mark Bubenik / by JBA
Mark Bubenik, WSBA #3093
Counsel for the Suquamish Tribe

Jeff Schuster / by JBA
Jeff Schuster, WSBA #7398
Counsel for the Jamestown S'Klallam Tribe
and Yakama Indian Nation

Ann Tweedy / by JBA
Ann Tweedy, WSBA #32957
Counsel for the Swinomish Tribe

Kevin Lyon / by JBA
Kevin Lyon, WSBA #15076
Counsel for the Squaxin Island Tribe

Harry Johnson / by JBA
Harry L. Johnson, WSBA #4955
Counsel for the Lummi Nation

Vivian Lee / by JBA
Vivian Lee, Chairperson
Hoh Tribe

Karen Allston / by JBA
Karen Allston, WSBA #25336
Joseph Caldwell, WSBA #22201
Office of Reservation Attorney
Quinalt Indian Nation